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7 Attorneys for Defendants

8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT OF ARIZONA**

10 Jeremy Thacker,

11 Plaintiff,

12 v.

13 GPS Insight, LLC; Robert J. Donat,  
14 Individually and as Trustee of The  
Robert Donat Living Trust Dated April  
19, 2017,

16 Defendants.

No. 2:18-cv-00063-PHX-DGC

**DEFENDANTS' RESPONSE TO  
PLAINTIFF'S MOTION IN LIMINE  
NO. 4 – SPOILATION**

17 Plaintiff offers no authority to support the premise of his motion: that if a party  
18 does not seek a spoliation *sanction*, it cannot present *evidence* that a party destroyed  
19 evidence to the jury. These are two distinct issues. *Wichansky v. Zowine, et al.*, CV-13-  
20 01208-PHX-DGC, 2016 WL 6818945, at \*11 (D. Ariz. Mar. 22, 2016) (denying a motion  
21 for sanctions but concluding that the “grievance about the missing recording can be  
22 presented to the jury through evidence and argument, with no need for the Court to place  
23 its thumb on the scale with an adverse inference instruction.”). Defendants can present  
24 the evidence regardless whether they seek or obtain an adverse inference instruction. The  
25 Court’s analysis of the motion can, and should, end here.

26 Plaintiff destroyed two types of evidence. First, the same day Plaintiff preserved  
27 other evidence, he wiped his work computer. Plaintiff claims he “provided Defendants  
28 with all information from his work computer...” Mot. at 2:7. Not quite. At his

1 deposition, Plaintiff testified that he “provided a copy of all ***work-related*** information” to  
 2 GPSI, but that he deleted “my personal information” so it could not be “obtained by a  
 3 jealous owner and used against me...” (Plaintiff Depo. at 15-17 (emphasis added),  
 4 attached as **Exhibit A**). Among the information Plaintiff irretrievably deleted were  
 5 conversations where there were “[o]ther employees talking about [Donat] or ... [about]  
 6 my personal relationship, just personal conversations for the most part” because Plaintiff  
 7 didn’t want “him having access to that.” (*Id.* at 16). Second, in February 2017 when  
 8 Defendants believe Plaintiff was contemplating this lawsuit, Plaintiff irretrievably deleted  
 9 Slack messages among himself and his key witnesses, Kristin Lisson and Robert Dennis  
 10 for the “[s]ame reason [he] gave for the other” evidence destruction.<sup>1</sup> (*Id.* at 18-20).

11       The mere fact that Plaintiff recognized the Slack messages and information on the  
 12 computer could be used against him shows: (1) he knew he was going to file a case where  
 13 it could be used against him; and (2) the information was relevant to the case.<sup>2</sup> From the  
 14 other information Plaintiff did not delete, we know both are true. Plaintiff’s destruction  
 15 of evidence is relevant to the jury’s evaluation of his credibility and candor.<sup>3</sup> *Anderson*  
 16 *v. Prod. Mgmt. Corp.*, 2000 WL 492095, 5 (E.D. La. 2000) (denying request for adverse  
 17 inference instruction; but “because evidence of the fact of destruction is relevant with  
 18 respect to [a party’s] credibility and reliability, plaintiffs will have the opportunity to  
 19 present the fact of inadvertent destruction . . . to the jury”); *U.S. v. Hsia*, 2000 WL 195068,  
 20 2 (D.D.C. 2000) (“The Court also agrees with the government’s arguments that the

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21       <sup>1</sup> Plaintiff’s motion relates solely to *his* efforts to destroy evidence. The evidence at trial  
 22 will be that his two key witnesses, Kristin Lisson and Robert Dennis, also destroyed or  
 23 helped Plaintiff destroy evidence.

24       <sup>2</sup> Plaintiff contends his supposed ignorance of the duty to preserve evidence is an excuse.  
 25 (Mot. 2:2-4) At best, arguments about Plaintiff’s culpable mental state go to whether the  
 26 Court should give an adverse inference instruction, not whether the evidence can be  
 27 presented. *See* Fed. R. Civ. P. 37(e)(2).

28       <sup>3</sup> Plaintiff raises the red herring of alleged spoliation by Defendants. *See* Mot. at 2:11-  
 25. There has been none. Regardless, Plaintiff presents no authority that this would be  
 26 relevant to whether the jury hears of *his* actions, because it is not. *See* *Wichansky*, 2016  
 27 WL 681945 at 11 (separately addressing each parties’ alleged spoliation). As such,  
 28 Defendants will not wade into the allegations again. *See, e.g.*, Docs. 152 at 7-8  
 (addressing sales policy) and 101 at 2 (Slack).

1 evidence of alteration, destruction or creation of documents is relevant to the  
 2 impeachment of [the credibility of] certain witnesses”).

3 As this Court’s decisions show, the jury should be permitted to hear this evidence  
 4 regardless whether Defendants seek, or the Court gives, an instruction. In addition to  
 5 *Winchansky*, this Court has on several occasions recognized the distinction between  
 6 evidence of spoliation and a sanction based upon spoliation. In *Tipp v. Adeptus Health*  
 7 *Inc.*, CV-16-02317-PHX-DGC 2018 WL 447256, at \*5 (D. Ariz. Jan. 17, 2018), the Court  
 8 denied a motion for a directed verdict or adverse inference jury instruction that had been  
 9 presented at the summary judgment stage, but held that the evidence of spoliation would  
 10 be presented to the jury:

11 ***Plaintiff will be permitted at trial to present evidence of Ms. Scott’s***  
***destruction of the handwritten notes and, at a minimum, to argue to the***  
***jury that the notes could have been helpful to her case.*** The Court will  
 12 decide at trial, or at the final pretrial conference if possible, whether it will  
 13 give an adverse inference instruction in light of all the evidence and, if so,  
 14 the precise form of that instruction.

15 (Emphasis added). And in *Pettit v. Smith, et al.*, CV-11-02139-PHX-DGC, 45 F. Supp.  
 16 3d 1099, 1111 (D. Ariz. 2014), the Court denied a request for case-dispositive sanctions  
 17 but concluded that “loss of evidence should be explained to the jury” and “that the jury  
 18 should be allowed to infer that the lost evidence would have favored Plaintiff’s position.”

19 This trio of cases confirms the obvious—that even losing a motion for sanctions  
 20 does not preclude evidence of spoliation before the jury. Defendants were not required to  
 21 file a motion for any adverse inference instruction in advance of the trial. That request is  
 22 appropriate after evidence has been presented at trial. See *Tipp*, 2018 WL 447256, at \*5;  
 23 *Pettit*, 45 F. Supp. 3d at 1111; *In re Ethicon, Inc. Pelvic Repair Sys. Prod. Liab. Litig.*,  
 24 299 F.R.D. 502, 526 (S.D. W. Va. 2014). Defendants had intended to wait until the  
 25 evidence had been presented, but Defendants are now contemporaneously filing such a  
 26 motion. Regardless, because filing a motion for sanctions is irrelevant to the presentation  
 27 of evidence of spoliation, Plaintiff’s Motion in Limine No. 4 should be denied.  
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1 RESPECTFULLY SUBMITTED this 5th day of December, 2019.  
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27 **CERTIFICATE OF SERVICE**  
28

29 I hereby certify that on December 5, 2019, I caused the foregoing document to be  
30 filed electronically with the Clerk of Court through ECF; and that ECF will send an  
31 e-notice of the electronic filing to:  
32

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